STATE OF MICHIGAN

COURT OF APPEALS

JAMES LITTLE, CHERYL LITTLE, STEVEN RAMSBY, MARY KAVANAUGH, STANLEY W. THOMAS, NANCY G. THOMAS, MICHAEL & GLADYS McCLUSKEY, and ANN SKOGLUND,

Plaintiffs/Counter-Defendants-Appellees,

v

BETTY H. HIRSCHMAN,

Defendant/Counter-Plaintiff-Appellant,

and

GERALD W. CARRIER, SALLY ANN CARRIER, JOHN P. VIAU, and GENEVIEVE GUENTHER VIAU,

Defendants/Counter-Plaintiffs,

and

FRANCIS J. VANANTWERP, ELIZABETH VANANTWERP, MASON F. SHOUDER, and JEAN ANN SHOUDER,

Defendants.

UNPUBLISHED
April 19, 2002

No. 227751
Cheboygan Circuit Court
LC No. 98-006480-CH

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant Betty H. Hirschman appeals as of right from the trial court's May 19, 2000, judgment following a two-day bench trial in this dispute over real property. We vacate the lower court's opinion and remand for further proceedings consistent with this opinion.

Mrs. Hirschman owns two adjoining waterfront lots in the Yequagamak plat in Inverness Township in Cheboygan County, where Mullet Lake and the Cheboygan River meet. Plaintiffs and the remaining defendants[1] are also lot owners in the Yequagamak plat. Mrs. Hirschman owns lots 46 and 47 in the plat. A review of the plat itself reflects the presence of several streets and twelve-foot wide "alleys." The plat was filed on August 20, 1913, by C.E. Foote and H.A. Hirschman, and the streets and alleys of the plat were "dedicated to the use of the public." The plat also refers to two parks, Lakeside Park, which abuts Mullet Lake, and Riverside Park, which abuts the Cheboygan River. Specifically, the plat reflects that the parks are "dedicated to the owners of the several lots" in the Yequagamak plat. As relevant to the present appeal, Mrs. Hirschman's property borders Lakeside Park, which contains a sandy beach. Mrs. Hirschman, and her now deceased husband, John J. Hirschman, acquired an interest in the property in 1965 from John's aunt, Bertine Bullock. Mrs. Hirschman acquired full title of the property after her husband's death in 1985 when she purchased his sister Annabel Corley's interest in the property.

Testimony during the trial revealed that residents of the Yequagamak plat have been congregating on the beach in Lakeside Park for many years. Specifically, people would gather on the beach to picnic, swim, sunbathe, and conduct bonfires and corn roasts. According to the record, Mrs. Bullock, Mrs. Hirschman's predecessor in interest, was a very social person who enjoyed entertaining people on the beach.

The alley between lot 47, owned by Mrs. Hirschman, and lot 48, owned by the Carrier family, was used by residents of the plat to access the beach by foot and motor vehicle. Over the years, the residents informally collected funds to clean and maintain the beach area in front of Mrs. Hirschman's property. However, in approximately the mid-1990s, it appears Mrs. Hirschman took steps to cease what she considered intrusive activity on the beach. According to her trial testimony as well as that of her son William, the amount of people using the beach and docking boats and other watercraft there increased during that time period, and broken bottles, dog feces, dirty diapers littered the beach.

The filing of the present action followed the disposition of another case in Cheboygan Circuit Court, in which the lower court, in a June 15, 1998, judgment, determined that the public had no interest in the plat's alleys because the public authority, the Cheboygan Road Commission, had not properly accepted the dedication. In February 1999, plaintiffs filed a "restated" first amended complaint alleging ten separate counts. Specifically, plaintiffs alleged they were entitled to use of the parks and alleys as a result of the 1913 dedication, as well as under theories of adverse possession, prescriptive easement, and acquiescence. In response, Mrs. Hirschman filed a second amended counterclaim on May 20, 1999, alleging that plaintiffs failed to accept the private dedication of the parks and that any dedication of the parks had been revoked by the plattors.

After plaintiffs moved to dismiss the second amended counterclaim on June 18, 1999, the trial court entered an order on September 16, 1999, granting summary disposition of the portions of the second amended counterclaim alleging that the dedication of the parks was revoked. The trial court also dismissed the portions of the second amended counterclaim referring to "property

[1] The remaining defendants are not parties to this appeal.

tax issues and/or causes of action." The bench trial in this matter was conducted on September 16 and 17, 1999. After the parties submitted proposed findings of fact and conclusions of law, the trial court entered a nine-page written opinion on February 25, 2000, detailing its findings of fact and conclusions of law.

Specifically, the trial court concluded that plaintiffs were entitled to use the alleys in the plat for access to the beach. Although it did not specially state under what legal theory it reached this conclusion, the trial court determined plaintiffs' scope of use of the alley between lots 47 and 48 by considering "an easement holder['s]" rights. The trial court went on to conclude that plaintiffs could access the alley between lots 47 and 48 "either by foot or motor vehicles but their use must not block or make the use of the alley inaccessible by the other parties." With regard to the parks in the plat, the trial court observed that "[t]he Plaintiffs have property rights in th[e] area designated as the lakeside park due to the fact that they are lot owners in the plat."

> Traditionally and historically, the lakeside park adjoining Ms. Hirschman's property has been used as a common beach area for swimming, sunbathing, picnicking, etc. The parties, through this traditional and historical use, have defined the scope and definition of the lakeside park.

However, the trial court qualified this ruling, noting that plaintiffs use of the lakeside park must be "reasonable," and in accordance with the plattors' intent, and therefore the plaintiffs could not use the beach past 10:00 p.m., and that the use of motorized vehicles and the mooring of personal watercraft was not permitted. However, the court ruled that the plaintiffs and their invited guests may use the beach for "traditional uses" such as swimming, sunbathing, picnicking, and other recreational activities. The trial court also ordered that Riverside Park may be used for "strolling, walking, and fishing." The trial court accordingly entered a permanent injunction on March 22, 2000. After Mrs. Hirschman moved for clarification and reconsideration, the trial court entered a final order denying the motion on May 19, 2000. Mrs. Hirschman now appeals as of right.

The essence of this action is a dispute over the use of real property. Actions to quiet title are equitable in nature and are reviewed de novo by this Court. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Road Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). We review the trial court's findings of fact for clear error. MCR 2.613(C); *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410 ; 487 NW2d 784 (1992). On appeal, Mrs. Hirschman first contends that the dedication[2] of the parks to the owners of the several lots was not a proper dedication because it was not directed to the public. In their brief on appeal, plaintiffs protest our consideration of this issue of law, arguing that Mrs. Hirschman failed to raise this precise issue before the trial court. However, it is well-settled that this Court, in the interests of justice, may consider an issue of law not previously decided by the trial court where the facts necessary to its resolution have been presented. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 57; 602 NW2d 215 (1999).

---

[2] A dedication is "an appropriation of land to some public use, accepted for use by or in behalf of the public." *Gunn v Delhi Twp*, 8 Mich App 278, 282; 154 NW2d 598 (1967).

On the basis of a recently released decision of this Court, *Martin v Redmond*, 248 Mich App 59; 638 NW2d 142 (2001), we agree with Mrs. Hirschman's contention that the dedication to the lot owners of the plat was invalid. In *Martin, id.* at 60, the Jarl Corporation, developers of the Tan Lake Subdivision in Oakland County, recorded a plat for the subdivision in 1969. The plat documents contained a dedication of the subdivision streets to the public, a designation of easements, along with a specification that "Outlot A is reserved for the use of the lot owners . . . ." *Id.* Outlot A consisted of two lots abutting Tan Lake. *Id.* In *Martin*, the plaintiffs were individuals who had purchased land in Outlot A who sought to have the language reserving its use to the other lot owners removed as null and void. *Id.* at 62. In response, the defendants, lot owners in the subdivision, argued that the language in the plat created a valid dedication for private use. *Id.* Thus, in *Martin, supra*, this Court was presented with the question whether the reservation of the use of Outlot A "for the use of the lot owners" was a valid dedication. After an exhaustive analysis of the controlling Michigan jurisprudence, the *Martin* Court concluded that the term "dedication" as used in real property law "clearly referred to an appropriation of land for *public use.*" *Id.* at 65. Specifically, the *Martin* Court quoted with approval our Supreme Court's ruling in *Kraushaar v Bunny Run Realty Co*, 298 Mich 233, 241-242; 298 NW 514 (1941), which in turn quoted 16 Am Jur 359:

> "Solely as individuals these plaintiffs cannot assert any rights based upon the dedication and acceptance of the plat; but, instead, rights of that character must be asserted, if at all, as a right or use *to which the public in general is entitled*.
>
> 'There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. In fact, the essence of a dedication to public uses is that it shall be for the use of the public at large. There may be a dedication of lands for special uses, but it must be for the benefit of the public, and not for any particular part of it; and if from the nature of the user it must be confined to a few individuals, . . . the idea of a dedication is negatived.'" [*Martin, supra* at 68-69 (emphasis in original).]

We are aware that the facts giving rise to this Court's decision in *Martin* took place in 1969, when the Land Division Act, formerly known as the Subdivision Control Act, MCL 560.101 *et seq.*, was effective, and that the platting in the present case occurred in 1913. However, as Mrs. Hirschman points out in her brief on appeal, the law in effect at the time of the platting in the present case, as codified by 1897 CL § § 3373 and 3374, also referred to dedication for *public uses*. Further, the Court in *Martin, supra* at 65 expressly acknowledged that "a thorough review of the case law . . . *before and after* the platting and subdivision statutes were enacted [demonstrates] that 'dedication' clearly referred to an appropriation of land for public use." [Emphasis added.] Further, although the Court's opinion in *Martin* could be read to have been confined to statutory dedications, we note that the elements of a common law dedication likewise require a dedication to the public. *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958); *Beulah, supra* at 554.[3]

---

[3] As our Supreme Court observed in *Kalkaska v Shell Oil Co (After Remand)*, 433 Mich 348, 354, n 11; 446 NW2d 91 (1989):

(continued…)

The trial court issued its February 25, 2000, written opinion in this case without the benefit of this Court's decision in *Martin, supra*, which was issued on October 26, 2001. Likewise, the parties filed their briefs in this matter before *Martin's* release. The trial court's written opinion reflects its mistaken legal conclusion that plaintiffs "have property rights in this area designated as the lakeside park due to the fact that they are lot owners in the plat," presumably pursuant to the dedication. However, we disagree with the trial court's conclusion, given the *Martin* Court's express conclusion that private dedications are invalid under Michigan law. *Martin, supra* at 65, 70.[4]

Given our conclusion regarding Mrs. Hirschman's first issue on appeal, we need not address the remaining issues as they pertain to the trial court's determination regarding the use of the parks. However, in the first amended complaint, plaintiffs alleged that they were entitled to use of the parks by virtue of acquiescence and under a prescriptive easement theory. Consequently, we remand to the trial court to allow it the opportunity to render findings of fact and conclusions of law with regard to whether plaintiffs are entitled to the use of the parks under these theories.

(…continued)

> "The effect of a dedication under the statute has been to vest the fee in the county, in trust for the municipality intended to be benefited, whereas, at common law, the act of dedication created only an easement in the public." [Quoting *Village of Grandville v Jenison*, 84 Mich 54, 65; 47 NW 600 (1890).]

[4] As noted, the trial court, in a separate case, vacated the alleys with respect to public use on the basis that the road commission did not properly accept the dedication. However, we note that, pursuant to *Martin, supra* at 70, plaintiffs, as lot owners in the plat, are entitled to use the alleys. As this Court observed in *Martin, id.*, "the general rule [is] that if a plat sets forth a public dedication that is not properly accepted by the [public authority], property owners within the plat maintain a private right of use." In so ruling, this Court quoted with approval its earlier holding in *Nelson v Roscommon Co Rd Comm*, 117 Mich App 125, 132; 323 NW2d 621 (1982). In *Roscommon, supra* at 132, the Court ruled:

> It is well-established that a purchaser of property in a recorded plat receives not only the interest as described in the deed but also whatever rights are indicated in the plat. *Kirchen v Remenga*, 291 Mich 94, 102-109; 288 NW 344 (1939); *Fry v Kaiser*, 60 Mich App 574, 577; 232 NW2d 673 (1975). A grantee of property in a platted subdivision acquires a private right entitling him 'to the use of streets and ways laid down on the plat' regardless of whether there was a sufficient dedication and acceptance to create public rights', *Rindone v Corey Community Church*, 335 Mich 311, 317; 55 NW2d 844 (1952). Therefore, whether or not the street in question was properly dedicated or accepted by [the public authority] is irrelevant as to the interests of the property owners within the subdivision. The private rights of those property owners to use the dedicated street cannot be extinguished by the township's failing to accept the street for public use.

On remand, if the trial court determines that plaintiffs are entitled to use of the parks, the trial court shall also determine what use of the alleys by plaintiffs is consistent with the scope of the dedication. See, e.g., *Thies v Howland*, 424 Mich 282, 289; 380 NW2d 463 (1985); *McCardel v Smolen*, 404 Mich 89, 97; 273 NW2d 3 (1978); *Little v Kin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 220894, issued February 1, 2002), slip op, 5-6. "'The intent of the plattors must be determined from the language they used and the surrounding circumstances.'" *Thies, supra* at 293, quoting *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928). However, where the plattors' intent is not discernable from the four corners of the plat, the contemporaneous and subsequent acts of the party may aid the court in its determination of the scope of the dedication. *Jacobs v Lyon Twp*, 444 Mich 914, 921; 512 NW2d 834 (1994) (Levin, J. dissenting).

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell